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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the JAMES W. PATRICK TRUST

JAMES D. TURNER et al.,

Petitioners and Respondents,

v.

YMELDA T. PATRICK,

Objector and Appellant.

G040620

(Super. Ct. Nos. A238763; A242366)

OPINION

Appeal from an order of the Superior Court of Orange County, Marjorie Laird Carter, Judge. Appeal dismissed.

Hess-Verdon & Associates, Jillyn Hess-Verdon and Edward L. Laird for Appellant Ymelda T. Patrick.

Rutan & Tucker and Theodore I. Wallace, Jr., for Respondent Ronald Patrick.

Lewis Brisbois Bisgaard & Smith and Gary M. Lape for Respondent James Turner.

Hinojosa & Wallace and Jeffrey Forer for Respondent Thaddeus Smith.

Anderholt & Turner and J. John Anderholt for Respondent Alacer Corporation.

* * *

We revisit the ongoing litigation over Alacer Corporation (Alacer), maker of the popular “Emer’gen-C” brand of vitamin supplements.¹ Plaintiff Ymelda Patrick appeals from an order issuing a preliminary injunction that barred the trustees of a trust holding Alacer shares from completing the sale of those shares. She claims the preliminary injunction is too narrow because it allows the trustees — including James Turner, Ronald Patrick (Patrick) and Thaddeus Smith (trustees) — to put Alacer’s stock up for auction and negotiate a letter of intent.

We dismiss the appeal as moot. While this appeal was pending, the court entered judgment against plaintiff. The judgment dissolved the preliminary injunction and adjudicated any pleading that would support a preliminary injunction.

FACTS

Alacer, the Trust, and the Consolidated Litigation

We draw some background facts from our prior opinion.

“Jay was the president of Alacer, which made Emer’gen-C and other vitamin supplements. Jay married plaintiff in 1989. Jay transferred all Alacer shares to

¹ In *Patrick v. Turner* (Oct. 22, 2008, G037607), a nonpublished opinion, we affirmed plaintiff’s removal as trustee of trust holding Alacer stock, but reversed dismissal of her shareholder derivative action against other trustees. In *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1003-1008, we held Alacer cannot challenge shareholder derivative claims asserted on its behalf, except on limited grounds.

the James W. Patrick Revocable Trust in 2000. The trust named as trustees Jay, plaintiff, Patrick, Smith, Turner, and Vernon G. Peck. Mr. Peck has since died.

“Jay amended the trust’s ‘Distribution upon Death’ provision in January 2001. The amendment provided: ‘(1) Because of the pending dissolution of marriage from my wife, Ymelda, her claims of a community property interest in my Alacer stock, and my desire that she not obtain or have control of a majority of the shareholder interest of Alacer, because of her inability to properly run the business, I direct that upon my death, if I am still married to Ymelda and she has at the time of my death a community property interest in the stock of Alacer, that the trustees distribute not more than 46% of the shares now held in my name to Ymelda, as her community share of my entire estate and that the balance of any community property interest that she may have in the Alacer stock or the community property owned by us be distributed to her from my estate as probated by the court and that it not be Alacer stock. It is my intention that of my entire estate she receive nothing of my separate property and only receive her community share of our community property, if any. [¶] (2) I direct the trustees to distribute 25% of my Alacer stock to my son, Ronald J. Patrick. [¶] (3) I direct the trustees to distribute 4% of my Alacer stock to my daughter, Alice, and (4) I direct the trustees to hold the remainder of my Alacer stock to be distributed, 21 years after the death of my youngest living grandchild, equally to my then living lineal issue.’” (*Patrick v. Turner, supra*, G037607 at pp. 4-5.)

Plaintiff filed a civil action alleging direct and shareholder derivative claims against Alacer and its directors, including Turner, Patrick, and Smith. (*Patrick v. Patrick* (Super. Ct. Orange County, 2003, No. 03CC14826).) She sought relief including damages, the involuntary dissolution of Alacer, and a declaration she had a community property interest in Alacer.

The parties also filed numerous probate petitions. Plaintiff filed a petition to remove the trustees. (*Patrick v. Patrick* (Super. Ct. Orange County, 2004, No.

A228941).) She later filed a petition for instructions concerning the distribution of Alacer stock to the trust's beneficiaries, including Jay's lineal issue. Turner filed a petition to remove plaintiff as a trustee. (*Turner v. Patrick* (Super. Ct. Orange County, 2004, No. A228275).)

The court consolidated plaintiff's civil action with the probate petitions. After protracted motion practice and a bench trial, the court entered judgment in the consolidated action dismissing plaintiff's civil action, removing plaintiff as a trustee, and denying her probate petitions. (*Patrick v. Turner, supra*, G037607, at p. 2.)

On appeal, we affirmed plaintiff's removal as trustee and the denial of her petitions. We held "[p]laintiff's removal deprives her of standing to pursue the other petitions because she is no longer a cotrustee and was never a trust beneficiary." (*Patrick v. Turner, supra*, G037607, at p. 3.)

But we reversed the dismissal of plaintiff's civil action because she had sufficiently stated derivative causes of action against the trustees. (*Patrick v. Turner, supra*, G037607, at p. 3.) Plaintiff had standing to assert her derivative claims because she adequately alleged she was a beneficial shareholder of Alacer. According to her complaint, she had a community property interest in Alacer, and the trust directed the trustees to satisfy her interest by distributing Alacer stock to her. (*Id.* at pp. 19-20.) We further held plaintiff should be given leave to amend the cause of action seeking a declaration of her community property interest in Alacer. (*Id.* at p. 30.)

The Barrington Auction of Alacer and the Preliminary Injunction

Turner filed a petition for instructions in July 2007 in this probate proceeding. (*Turner v. Patrick* (Super. Ct. Orange County, 2007, No. A238763).) He sought "an order allowing the trustees now to sell the Alacer Corp. stock" held by the trust. Turner asserted "this is an opportune time to sell the shares, and several potential purchasers have indicated an interest in purchasing the shares."

On the same day, Turner filed an amended petition for instructions. He sought an order “to authorize and ratify the distribution” of Alacer shares to beneficiaries Alice Nigl and Patrick, “pursuant to the terms of the Trust.”

Two months later, Turner sent an email to plaintiff’s counsel and the trustees. Turner stated, “The board of directors has embarked upon the course of hiring Barrington Associates[,] an investment banking firm[,] to conduct an auction [in] order to obtain the highest and best price for the stock of Alacer.” Turner attached a copy of a proposed letter of intent from Dave Baram, whereby VMG Equity Partners would purchase all Alacer stock for \$70 million. Turner’s email and the letter of intent refer to a prior, rejected purchase offer. Turner ended his email by stating, “If others among you disagree, I am open to having a discussion.”

Subsequently, Alacer retained Barrington & Associates (Barrington) to obtain purchase bids in an auction process. Barrington solicited bids in the first half of 2008. Meanwhile, plaintiff informed Turner she objected to the auction.

Plaintiff applied ex parte for a temporary restraining order (TRO) in April 2008. She contended Barrington had been circulating offering books to potential bidders for the Alacer stock, without disclosure to her, even though the trust directs the trustees to distribute Alacer shares to her to satisfy her community property interest. She asked for an order restraining Alacer and the trustees “[f]rom obligating, encumbering or attempting to transfer the shares or assets of Alacer Corporation before they are distributed to the beneficiaries of the Trust pursuant to the petitions that are now pending before this court.” The court issued the TRO.

At the same time, plaintiff also applied for an order to show cause re preliminary injunction. She sought to enjoin Alacer and the trustees “from obligating, encumbering or attempting to transfer the shares or assets of Alacer Corporation before they are distributed to the beneficiaries of the Trust pursuant to the petitions that are now pending before this court.” She also sought to require the trustees “to not withhold from

[plaintiff] information in their possession or under their control related to any efforts to obligate, encumber or transfer the shares or assets of Alacer Corporation.”

After a May 5, 2008 hearing, the court issued a preliminary injunction. The court enjoined Alacer and the trustees “from selling or accepting an offer to purchase, or encumbering the stock of Alacer held in the James W. Patrick Trust pending further order of this court or judgment on or disposition of the Petition by Co-Trustee Turner for Instructions (for an order instructing and authorizing the trustees to sell the Alacer Corp. stock held in the Trust to the purchaser who makes the best offer for the stock).” It ordered Alacer and the trustees to produce to plaintiff “a copy of any written agreement or agreements with Barrington for Barrington to solicit strategic financing options or offer(s) for Alacer stock”

Plaintiff applied ex parte to modify the preliminary injunction. She stated she had obtained a copy of the Barrington retainer agreement, pursuant to which Alacer had already paid “substantial fees” to Barrington.² She complained the agreement obligated Alacer to pay commissions to Barrington “even for prospects that were introduced through others besides Barrington” and “even if a transaction is completed without Barrington’s assistance.”

In her application, plaintiff asked the court to modify the injunction “1. To prohibit any sale of Alacer whether as a stock sale or asset sale without court approval; [¶] 2. To prohibit payment of any expenses, fees or commissions to Barrington without court approval; [¶] 3. To prohibit all activities toward an actual sale of Alacer stock or

² Plaintiff sought an order holding Alacer and the trustees in contempt for failing to produce documents regarding Barrington. Turner and Patrick responded the preliminary injunction had expired because Turner voluntarily dismissed his petition for instructions to sell the Alacer stock. The record on appeal contains the request for dismissal, but no entry of dismissal by the clerk. The parties conceded at oral argument Turner’s petition had been dismissed.

assets other than marketing; [¶] 4. To require that Barrington be served with notice of the Injunction as issued and as modified.”

Plaintiff submitted a proposed modification order. Her proposed order provided “1. The Preliminary Injunction shall remain in effect until further order of court or final disposition of the above captioned Petitions [A23873 and A242366]; [¶] 2. Until further order of court or final disposition of the above captioned Petitions, [Alacer] and [the trustees] are further enjoined and restrained: [¶] a. From selling, accepting an offer to purchase, encumbering or otherwise obligating Alacer for purposes of any asset sale other than in the ordinary course of business; [¶] b. From paying any expenses, fees or commissions relative to any marketing of an interest in Alacer, whether by a stock sale, asset sale, strategic financing or otherwise; and [¶] c. From taking any action to arrange or accomplish a stock sale, asset sale or strategic financing for Alacer, other than the solicitation of interest or offers for purchase that do not obligate or encumber Alacer.”

The court granted in part and denied in part plaintiff’s modification request on July 3, 2008. It barred Alacer and the trustees from selling Alacer, encumbering it for sale purposes, or paying any “additional” marketing expenses. But the court rejected plaintiff’s proposal to bar the trustees from arranging to sell Alacer or secure strategic financing for it.

This Appeal

Plaintiff immediately filed a notice of appeal “from the Preliminary Injunction issued herein on May 5, 2008 including any modification thereto.” She filed a petition for a writ of supersedeas on July 24, 2008. We issued a temporary stay the next day, staying “[a]ny auction process for the sale of Alacer stock or its assets — and any effort to market or sell Alacer stock.”

We issued our opinions in *Patrick v. Turner*, *supra*, G037607, and *Patrick v. Alacer*, *supra*, 167 Cal.App.4th 995, in October 2008. Turner thereafter filed a motion to lift the temporary stay.

In December 2008, we issued a writ of supersedeas “[i]n order to preserve the jurisdiction of this court.” We stayed, pending resolution of plaintiff’s appeal from the July 3 order, “any auction process for the sale of Alacer stock, including the auction process currently being conducted by Barrington & Associates, and any effort by any party . . . to market or sell the Alacer stock.” We denied Turner’s motion to lift the temporary stay as moot.

DISCUSSION

The Appeal is Dismissed as Moot

Although the court issued a preliminary injunction at plaintiff’s request, on appeal plaintiff contends the preliminary injunction is too narrow. She contends the court erred by failing to enjoin Alacer and the trustees from any effort to market the Alacer stock before the trustee’s distribute it as directed by the trust. Plaintiff asserts she is a beneficial Alacer shareholder through her community property interest in Alacer and the trust’s distribution provision. (See *Patrick v. Turner*, *supra*, G037607 at pp. 19-20.) She claims a broader injunction is necessary due to “the simple principle that one cannot sell or pledge what one does not own” — in other words, the trust should not be allowed to negotiate the sale of Alacer stock that actually belongs to plaintiff.

Turner filed a motion to dismiss the appeal as moot. He supported his motion with a copy of a judgment entered in this action on May 13, 2009, of which we take judicial notice.

The judgment notes the court had “granted the motion of Turner for judgment on the pleadings both as to the petition [plaintiff] had brought under Probate

Code section 17200 and on her response to the petition brought by Turner, as [plaintiff] did not demonstrate to the court how she could possibly amend her section 17200 petition or the response to Turner's petition, to give her standing." The judgment provides plaintiff "shall take no relief by reason of her Second Amended Petition as she is no longer a co-trustee of the Trust and was never a Trust beneficiary, and that Turner shall, and hereby does have judgment against [plaintiff] on his petition."

The court had jurisdiction to adjudicate the parties' probate petitions pending appeal. "An appeal from an order denying a preliminary injunction does not deprive the trial court of jurisdiction to proceed to try the case on the merits." (*MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623 (*MaJor*)). "In order to avoid this result the plaintiff may request a stay of trial court proceedings while the appeal from denial of the preliminary injunction is pending." (*Id.* at pp. 623-624.) Plaintiff obtained no such stay. While our writ of supersedeas stayed efforts to market or sell Alacer stock, it did not stay the trial court proceedings.

The judgment against plaintiff moots her appeal.

The judgment dissolved the preliminary injunction by operation of law. "A preliminary injunction is a device to protect the rights of litigants pending a final determination of the merits of the action; it is but an adjunct to the action and its fate is hinged to the main action. The general purpose of such an injunction is to preserve the status quo until a final determination of the merits of the action. [Citation.] Thus, when a judgment is entered in favor of the defendant, the preliminary injunction dissolves without the necessity of a formal motion to dissolve." (*City of Oakland v. Superior Court* (1982) 136 Cal.App.3d 565, 569 (*Oakland*)).

As a leading commentator observes, "where the provisional remedy [of a preliminary injunction] is granted, and the defendant appeals, the action may be tried and decided while the appeal is pending. The preliminary injunction will then be merged in the permanent injunction [if plaintiff prevails] *or will terminate on denial of a permanent*

injunction [if defendant prevails]. In either case, the appeal from the order granting the preliminary injunction is rendered moot and may be dismissed.” (6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 402, p. 344, italics added.)

And the court has now adjudicated the probate petitions that could support issuance of a preliminary injunction. “A preliminary injunction is an interim remedy designed to maintain the status quo pending a decision on the merits. [Citation.] It is not, in itself, a cause of action. Thus, a cause of action must exist before injunctive relief may be granted. [Citation.] Accordingly, where the complaint fails to state a cause of action an order granting a preliminary injunction must be reversed.” (*MaJor, supra*, 7 Cal.App.4th at p. 623.) When the court resolves “the only cause of action which might have supported a preliminary injunction in favor of [the appellant], [an] appeal from the denial of a preliminary injunction is moot.” (*Ibid.* [appeal moot where court sustained demurrer without leave to amend]; accord *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 398-399 [same].)

In sum, no relief is available to plaintiff in this appeal. Even if we accepted her claims on appeal and reversed, no preliminary injunction exists to be modified. The preliminary injunction has been terminated by operation of law. (See *Oakland, supra*, 136 Cal.App.3d at p. 569; see also 6 Witkin, *supra*, Cal. Procedure, § 402, p. 344; cf. *MaJor, supra*, 7 Cal.App.4th at p. 623.)

As for plaintiff’s contention the trust is trying to sell what it does not own, she is not necessarily without remedy. The declaratory relief action in which she seeks an adjudication of her community property interest in Alacer is still pending. If plaintiff wishes to enjoin the trust from selling Alacer stock that allegedly belongs to her, she may pursue injunctive relief in that action — we express no opinion on her likelihood of success.

DISPOSITION

Turner's motion to dismiss this appeal is granted. The appeal is dismissed. Respondents shall recover their costs on appeal. The writ of supersedeas will dissolve by its terms upon issuance of the remittitur.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.